

BILL ANALYSIS

Senate Research Center

S.B. 1611
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Criminal Justice
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Criminal discovery—the exchange of relevant information between prosecutors and the defense prior to trial—is both necessary for a fair and just criminal justice system, and also required as part of a defendant's constitutional right to a full defense.

Brady v. Maryland requires prosecutors to turn over to the defense any evidence that is relevant to the defendant's case. However, *Brady* is vague and open to interpretation, resulting in different levels of discovery across different counties in Texas. That is why a uniform discovery statute is needed. S.B. 1611 will save attorney resources as well as taxpayer dollars by limiting discovery disputes and increasing efficient resolution of cases, all while reducing the likelihood of costly appeals and wrongful convictions.

S.B. 1611 requires prosecutors to turn over to the defense any relevant evidence that may help the defendant, including witness lists. The defense also has a reciprocal obligation to turn over certain information to the prosecution. S.B. 1611 also clearly defines what is considered to be privileged work product so that there is no question as to what is considered confidential.

Open file discovery is important for several reasons. First, it promotes efficiency in the criminal justice system. A defendant who understands the extent of the evidence against him can make an informed decision to plead. It also allows for a full defense, lessening the likelihood of an overturned verdict on appeal. The state saves thousands of dollars in appeals, incarceration, and potential compensation for wrongful convictions.

Open file discovery also ensures that each defendant is guaranteed his constitutional right to a defense, regardless of where he is charged. A defendant's chances to a fair trial often vary according to jurisdiction, because of the lack of a uniform discovery law. A statewide criminal discovery policy ensures that no matter where a defendant is on trial, he is guaranteed to all the protections afforded to him by the Constitution.

Most importantly, S.B. 1611 helps prevent wrongful convictions. Recent high profile cases in Texas show that with open file discovery, the likelihood that evidence relevant to the defendant's innocence would have been revealed is increased. Every defendant should have access to all the evidence relevant to his guilt or innocence, with adequate time to examine it. The state also saves billions of dollars in ensuring that the defendants sent to prison are actually guilty. Finally, public safety is threatened if an innocent person is in prison while the guilty party goes free.

S.B. 1611 will uphold a defendant's constitutional right to a defense, minimize the likelihood of wrongful convictions, save thousands in taxpayer dollars, promote an efficient justice system, and improve public safety, all while increasing the public's confidence in the criminal justice system.

As proposed, S.B. 1611 amends current law relating to discovery in a criminal case.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Article 39.14, Code of Criminal Procedure, is amended, as follows:

Art. 39.14. DISCOVERY

Sec. 1. DISCLOSURE BY STATE. (a) Requires the attorney representing the state, subject to the restrictions provided by Article 39.15 (Discovery of Evidence Depicting or Describing Abuse of or Sexual Conduct by Child or Minor), beginning no later than 30 days after the initial appearance of the defendant, to disclose to the defendant's counsel and permit inspection, photocopying, and photographing of the following materials and information in the possession, custody, or control of all law enforcement agencies, investigatory agencies, and prosecutors' offices, any other governmental entity, or any non-governmental entity contracting for work with any government entity involved in the investigation of the crimes alleged or in the prosecution of the defendant,

- (1) any evidence relevant to the defendant's guilt or punishment;
- (2) any written or recorded statement made by the defendant, any witness, any law enforcement officer, or any other person that is related to the case charged, including offense reports by law enforcement or other government personnel and electronically recorded statements, if any;
- (3) any written record containing the substance of any oral statement that is made by the defendant and that is related to the case charged;
- (4) the defendant's prior criminal record. Provides that if disclosure of a specific document reflecting the defendant's criminal history is not permitted by state or federal law, then the content of the defendant's criminal history is required to be disclosed in writing. Requires a judge to on request issue an order requiring disclosure of the records if a court order is required for disclosure by state or federal law;
- (5) any record of a criminal conviction or other criminal history admissible for impeachment under the Texas Rules of Evidence, of a witness the attorney representing the state intends to call at the trial, or has reason to believe may be called as a witness at trial by the state;
- (6) any affidavit, warrant, or return pertaining to a search or seizure in connection with the case;
- (7) any physical or documentary evidence related to the case charged that was obtained from or that belongs to the defendant or that the attorney representing the state intends to use against the defendant in the case charged and, on a showing of materiality by the defendant, the opportunity to test that evidence;
- (8) the names and addresses of the witnesses called to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence;
- (9) any document or recording produced by or for an expert witness related to the case charged; and
- (10) any plea agreement, grant of immunity, benefit promised or conferred, or other agreement for testimony or assistance issued by the attorney representing the state or any law enforcement officer or agency in connection with the case.

Deletes existing text requiring the court in which an action is pending, upon motion of the defendant showing good cause therefor and upon

notice to the other parties, except as provided by Article 39.15, to order the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the state or any of its agencies. Deletes existing text requiring the order to specify the time, place, and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence; provided, however, that the rights herein granted are not required to extend to written communications between the state or any of its agents or representatives or employees. Deletes existing text providing that nothing in this Act is required to authorize the removal of such evidence from the possession of the state, and that any inspection is required to be in the presence of a representative of the state.

(b) Requires the state to give to the defendant, at the beginning of jury selection, a written list of the names of all witnesses who the state reasonably expects to call during trial, as well as the criminal histories of those witnesses, in a manner consistent with state and federal law. Authorizes any party, following the disclosure of a witness's name, to request the court to order, on a showing of good cause, the disclosure of the last known address for the witness. Provides that a court, on request, is authorized to, and on a showing of a good cause, is required to order earlier disclosure of the names and addresses of all witnesses who the state reasonably expects to call during trial.

Deletes existing text authorizing the court in which an action is pending, on motion of a party and on notice to the other parties, to order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party is authorized to use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. Deletes existing text requiring the court to specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party is required to make disclosure, the court is required to require the other party to make the disclosure not later than the 20th day before the date the trial begins.

(c) Requires the attorney representing the state, if the defendant gives notice of an alibi under Section 2(c)(2), to disclose to the defendant's counsel as soon as practicable the names of the witnesses of whom the state has knowledge and whom the state intends to use to rebut the alibi or the testimony of any of the defendant's witnesses called to establish the alibi.

(d) Requires law enforcement and investigatory agencies, on a timely basis, to make available to the attorney representing the state and requires the attorney representing the state to request a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this article. Requires investigatory agencies that obtain information and materials listed in Subsection (a) of this section to ensure that such information and materials are fully disclosed to the prosecutor's office on a timely basis for disclosure to the defendant.

(e) Provides that, except as otherwise permitted by this article, this article does not authorize the removal of physical evidence from the possession of the state, and any inspection of physical evidence is required to be conducted in the presence of a representative of the state. Requires a court to, when requested and

as necessary under the circumstances, order specific inspection procedures necessary to protect the integrity of the evidence and the ability to inspect it in a manner that does not compromise a defendant's ability to maintain confidentiality of work product and the attorney client privilege.

Sec. 2. DISCLOSURE BY DEFENDANT. (a) Requires the defendant, after receiving the initial disclosure under Section 1 from the attorney representing the state, to disclose to the attorney representing the state and permit inspection, photocopying, and photographing of the following materials and information:

(1) any written or recorded statement by a witness, other than the defendant, that is related to the offense charged, if the defendant intends to call the witness at trial;

(2) any physical or documentary evidence that the defendant intends to use in its case in chief and, on a showing of materiality by the attorney representing the state, the opportunity to test that evidence;

(3) the names and addresses of the witnesses called to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence; and

(4) any report produced by or for an expert witness the defendant intends to call at the trial.

(b) Requires the defense to give the state, at the beginning of jury selection, a written list of the names of all lay witnesses who the defense reasonably expect to call during trial. Authorizes any party, following the disclosure of a witnesses name, to request the court to order, on a showing of good cause, the disclosure of the last known address for the witness.

(c) (1) Requires a defendant who is authorized to assert one or more defenses or affirmative defenses listed in Chapter 8 (General Defenses to Criminal Responsibility) or 9 (Justification Excluding Criminal Responsibility), Penal Code, if requested in writing by the attorney representing the state, to provide the state with written notice that the defendant is authorized to assert the statutory defense or affirmative defense. Requires that notice be provided by the defendant not later than the 30th day before the date that jury selection begins, or as soon as practicable after the date the defendant receives a disclosure under Section 1 to which the defense is responsive, whichever is later. Requires the defendant, if the state amends the information or indictment or files a new information or obtains a new indictment within 30 days of the beginning of jury selection, to be allowed not less than 10 days after being served with an amended or new information or indictment, or having received actual notice of the amendment in open court, to amend or supplement an existing notice or provide an initial notice. Provides that any notice provided under this subsection is for purposes of discovery only and is not admissible at trial.

(2) Requires a defendant who will assert an alibi, if requested in writing by the attorney representing the state, and if the attorney representing the state provides the defendant in such written request with the specific date, time, and place of the alleged offense, to provide the state, not later than 20 days before the beginning of jury selection, a written response including the location at which the defendant claims to have been at the time of the alleged offense and the names of the witnesses the defendant intends to use to establish the alibi.

Sec. 3. EXCEPTIONS TO DISCLOSURE. (a) Provides that neither the attorney representing the state nor the defendant is required to disclose materials or information that is:

(1) recorded proceedings of a grand jury, except as required by the Texas Rules of Evidence, other law, or court order;

(2) a work product, meaning written materials drafted by an attorney or the attorney's legal staff for their own use, including witness examinations, voir dire questions, opening statements, closing arguments, legal research, or of records, correspondence, reports, memoranda, or notes prepared by the attorney or by members of the attorney's legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the attorney or the attorney's legal staff. Provides that records, correspondence, reports, memoranda, or notes prepared by the prosecuting attorney, its agents, or by members of the prosecuting attorney's legal staff are not work product as to any portion that contains potentially favorable or exculpatory or impeaching information as to guilt or punishment or information that may mitigate punishment. Provides that disclosure is also not required of any document of the attorney representing the defendant, or an investigator or other agent of the attorney representing the defendant that is made in connection with the investigation, prosecution, or defense of the case; or

(3) privileged under a rule of evidence, an express statutory provision, the Texas Constitution, or the United States Constitution.

(b) Provides that this article does not authorize disclosure of the name, address, or telephone number of a victim in violation of Chapter 57 (Confidentiality of Identifying Information of Sex Offense Victims).

(c) Requires a victim impact statement to be provided to the defendant at the beginning of jury selection if the person completing the victim impact statement is disclosed by the state as a potential witness on its witness list or there is reason to believe that the person is authorized to otherwise testify at the trial. Provides that a victim impact statement is subject to disclosure as any other evidence or information if it contains exculpatory material.

Sec. 4. CONTINUING DUTY TO DISCLOSE. Requires the party, if, subsequent to compliance with this article or a relevant court order, a party discovers additional material or information subject to disclosure, to immediately notify the other party's counsel of the existence of the additional material or information.

Sec. 5 CERTIFICATE OF COMPLIANCE. Requires a party, each time a party provides discovery, disclosure, or notice required or permitted by this article or pursuant to court order, to file with the court a Certificate of Compliance listing the items provided or disclosed or the notice given. Authorizes any party to request any other party to acknowledge receipt of any discovery, disclosure or notice provided for by this article or required by court order and the party receiving such discovery, disclosure, or notice to, when requested, acknowledge in writing, or on the record in open court, the receipt of any discovery, disclosure, or notice. Requires the other party, on request of any party, to certify either in writing or on the record in open court that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery and disclosure and has provided all required notices, and if not previously identified in a Certificate of Compliance is required to identify each item of provided discovery, disclosure and notice. Requires an additional or supplemental Certificate of Compliance, if further discovery is provided after the filing of a Certificate of Compliance, to be filed with the court, or announced on the record in open court, identifying the additional items of discovery, matters or information disclosed, or notice given.

Sec. 6. EXCISION. (a) Provides that, except as provided by Subsection (b), if a portion of material or information is subject to discovery under this article and a portion is not subject to discovery, only the portion that is subject to discovery must be disclosed. Requires the disclosing party to inform the other party's counsel that the portion of

material or information that is not subject to discovery has been excised and withheld. Requires the court, on request, to conduct a hearing to determine whether the reasons for excision are justifiable. Requires that material or information excised pursuant to judicial order be sealed and preserved in the records of the court and to be made available to an appellate court in the event of an appeal.

(b) Provides that excision of a witness statement produced in accordance with the Texas Rules of Evidence is governed by that rule.

Sec. 7. PROTECTIVE ORDERS. Authorizes the court, on a showing of good cause by either party, to, at any time, enter an appropriate protective order that a specified disclosure be denied, restricted, or deferred. Defines "good cause."

Sec. 8. IN CAMERA PROCEEDINGS. Authorizes the court, on request, to permit to be made in camera an excision hearing under Section 5(a), a showing of good cause for denial or regulation of a disclosure under Section 6, or any portion of a proceeding. Requires a verbatim record to be made of a proceeding in camera. Requires the entire record, if the court excises a portion of the material or information or enters an order granting relief following a showing of good cause, to be sealed and preserved in the records of the court and to be made available to an appellate court in the event of an appeal.

Requires a court to permit counsel for both parties to be present at the in-camera excision hearing, or, for portions of the in-camera excision hearing as the circumstances require, unless doing so would result in a violation of a privilege under the Rules of Evidence or if the court cannot, through a protective or confidentiality order, achieve the purposes of the in-camera hearing. Authorizes the court to issue such protective and confidentiality orders as are necessary to prevent dissemination of proceedings held in-camera and as to any material excised. Requires a court order under this section to only be as narrow as necessary to achieve the purposes of the excision.

Sec. 9. CONFERENCE. Requires the court, on request or motion of any party or on its own motion, to hold a discovery conference to resolve any discovery, disclosure, or notice issue, to ensure that the parties are aware of their respective discovery, disclosure, and notice obligations under this article, or to verify compliance by each party with this article. Requires that any party who has not received required or requested discovery, disclosure, or notice, request a discovery conference to be held not later than 20 days before the beginning of jury selection to resolve any issue with respect to the discovery, disclosure, or notice.

Sec. 10. COMPLIANCE; SANCTIONS. (a) Authorizes the disclosures required under this article to be performed in any manner that is mutually agreeable to the attorney representing the state and the attorney representing the defendant or that is ordered by the court in accordance with this article. Authorizes the order issued by the court to specify the time, place, and manner of making the required disclosures.

(b) Authorizes the court, if the court finds that a party has failed to comply with any of the provisions of this article, to order and compel such party to provide the required discovery or disclosure, grant a continuance, issue a protective order, take other appropriate action as necessary under the circumstances to accomplish the purposes of the required discovery or disclosure, or, and only if other remedial alternatives have been exhausted, prohibit the introduction of certain evidence, the calling of certain witnesses, or other relief necessary to assure justice. Prohibits the court from dismissing a charge under this subsection unless authorized or required to do so by other law.

Sec. 11. COSTS. (a) Requires that all reasonable and necessary costs related to a disclosure required under this article, including the photocopying of materials, be paid by the requesting party, except that an indigent defendant to not be required to pay costs

provided for by this article. Prohibits costs under this article from exceeding those provided for by the Texas Public Information Act.

(b) Prohibits the commissioners court of the county in which the indictment, information, or complaint is pending from, as a result of any payment by the defendant of the costs required by this article, reducing the amount of money provided by the county to the office of the attorney representing the state, or reducing the amount of money provided to a public defender's office as a result of costs paid to it under this article.

Sec. 12. DISCLOSURE TO THIRD PARTIES. Prohibits the attorney representing the state, the attorney representing the defendant, or an investigator, expert, or other agent for the attorney representing the state or the attorney representing the defendant, before the date on which the trial begins, from disclosing, without obtaining approval of the trial court, information or witness statements received from the opposing party to any third party, other than to an investigator, expert, consulting counsel, or other agent for the attorney representing the state or the attorney representing the defendant, as applicable. Prohibits information or witness statements received under this article, and not otherwise made a part of a public record as part of judicial proceedings, from being made available to the public without a court order permitting such disclosure.

Sec. 13. DISCLOSURE OF CERTAIN CONTACT INFORMATION. (a) Authorizes the attorney representing the state, without a protective court order or a hearing before the court, to excise from an offense report or other report any contact information of the alleged victim of an offense that is listed under Section 3g, Article 42.12, or Article 62.001(5).

(b) Requires the court, on request of the defendant, and on a showing of good cause, to order disclosure to the defense of the alleged victim's contact information subject to reasonable limitations on further disclosure, which may include, as the circumstances require, an order prohibiting the attorney representing the defendant from disclosing the information to the defendant or others.

Sec. 14. PRO SE DEFENDANTS. Provides that this article, including the provisions regarding the nondisclosure of a witness statement or an offense report by law enforcement personnel, applies to a defendant who has elected to proceed pro se only to the extent approved by the court.

Sec. 15. THIRD PARTY DISCOVERY. Authorizes a party to obtain, other than from the office of the attorney representing the state, and other than documents or items provided by the attorney representing the state, documents from other persons, entities or third parties by serving such person or entity with a subpoena for such documents that provides a reasonable time and place for production of the documents. Authorizes a person or entity served with such a subpoena to, itself or through its counsel, before the time for compliance, object to or seek protection from the request. Authorizes the court to enter any order appropriate under the circumstances to assure a reasonable time, place, manner, or scope of production. Requires costs for production, unless the court orders otherwise, to be paid by the party requesting the production, provided that such costs are prohibited from exceeding those allowed under the Texas Public Information Act.

Sec. 16. CONFLICT OF LAW. Provides that to the extent of any conflict, this article prevails over Chapter 552 (Public Information), Government Code.

SECTION 2. Provides that the change in law made by this Act applies to the prosecution of an offense committed on or after the effective date of this Act and to any prosecution initiated after the effective date of this Act. Provides that the prosecution of an offense committed before the effective date of this Act and the prosecution of an action initiated before the effective date of this Act is covered by the law in effect when the offense was committed or the prosecution commenced, and the former law is continued in effect for this purpose. Provides that, for

purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date and a prosecution is commenced before the effective date of this Act if a complaint, information or indictment has been filed or obtained by the attorney representing the state and the defendant has been arrested for such offense before the effective date of this Act.

SECTION 3. Effective date: January 1, 2014.